LEGAL MEMORANDUM

TO: G. David Guntharp, Chair, Interstate Commission for Adult Offender Supervision

FROM: Richard L. Masters, General Counsel

DATE: February 4, 2004

RE: Request for Clarification on Rulemaking Procedures

I have received and reviewed the request for clarification as to rulemaking procedures under the applicable provisions of the Interstate Compact for Adult Offender Supervision (ICAOS) and the applicable rules submitted to you for consideration by Commissioner Benjamin A. Martinez of Pennsylvania. His request expresses concerns in three areas in which he asserts the following:

1. The provisions of Section 2.109 of the Compact rules are not consistent with the Federal Administrative Procedures Act (APA).

2. The provisions of Article VIII of the Compact pertaining to rulemaking procedure and the provisions of Rule 2.109 are in contradiction.

3. The provisions of Rule 2.109 do not provide for submission of written comments by the public concerning a proposed rule.

Addressing these contentions in order, with respect to the first concern it is important to note that Article VIII of the Compact does not impose upon the Interstate Commission an obligation to either adopt or comply with all of the provisions contained in the federal Administrative Procedures Act (APA). Article VIII only requires that the rulemaking procedures of the Commission “substantially conform to the principles of the federal APA.” (emphasis supplied). The “principles” of the APA, in general terms, seek to promote two primary objectives which are enshrined in the due process clause of the 5th and 14th Amendments to the U.S. Constitution; that reasonable notice of a proposed administrative regulation be provided and that a reasonable opportunity to be heard is afforded through written or oral comments or both. See *Goldberg vs. Kelly, 397 U.S. 254 (1970)*. Rule 2.109 is consistent with these “principles” by providing for both adequate notice of the proposed rule or amendment at least thirty (30) days prior to its adoption and for an opportunity to be heard at a public hearing where both written comments and oral testimony may be submitted.

With regard to the second concern raised by Commissioner Martinez, a comparison of the provisions of Article VIII with the provisions of Rule 2.109 reveals that while the provisions of the rule contain more detail than Article VIII of the Compact, they are not inconsistent. It was the intention of the Rules Committee to implement the general
rulemaking provisions of Article VIII through the specific language of Rule 2.109 pertaining to four areas: 1) publication of proposed rules, 2) allowing public comment 3) provision for an informal hearing, and 4) promulgation of final rules. Rule 2.109 provides the specific procedures through which these general provisions are accomplished.

Finally, with respect to the third issue raised by the Commissioner and contrary to the assertion in that regard, Rule 2.109, Subsection (b) (2) and Subsection (c) provide for both the submission of written comments and oral testimony by members of the public.

In sum, Rule 2.109 represents the Interstate Commission’s efforts to codify its rulemaking procedures in a simple and straightforward manner consistent with the legislative mandate contained in Article VIII of the Compact. If you have further questions pertaining to the application of the foregoing provisions related to the conduct of the rulemaking functions of the Interstate Commission or other related business, please advise.